No. 80-581

In the Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, ET AL., APPELLANTS

v.

STATE OF MONTANA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether, conceding that the Mineral Lands Leasing Act of 1920 permits a state to impose some tax on a lessee who severs coal from federal lands, the Montana Coal Severance Tax, as applied to the mining of federally owned coal in that State, is nevertheless inconsistent with the Mineral Lands Leasing Act and therefore invalid under the Supremacy Clause of the Constitution because of the amount of the tax.

2. Whether, conceding that federal legislation governing the development and use of energy resources does not bar states from imposing some tax on the severance of coal, the Montana Coal Severance Tax is nevertheless inconsistent with federal energy legislation and therefore invalid under the Supremacy Clause of the Constitution because of the amount of the tax.

3. Whether, conceding that the Interstate Commerce Clause of the Constitution does not, of its own force, bar

a state from imposing some tax on the severance of coal within its borders, the rate of the Montana Coal Severance Tax is impermissible under the Commerce Clause either because it is not "fairly related" to the services furnished to coal producers by the State of Montana or because most of the coal mined in Montana is shipped out of the State.

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This brief is submitted in response to the Court's invitation of December 8, 1980.

ARGUMENT

INTRODUCTION AND SUMMARY

Appellants assert that the Montana Coal Severance Tax, imposed at a rate of up to 30 percent, is in conflict with federal legislation and therefore invalid under the Supremacy Clause of the Constitution, Art. VI, cl. 2, and that it discriminates against and creates an undue burden on interstate commerce in violation of the Interstate Commerce Clause of the Constitution. Art. I, § 8, cl. 3. They do not argue that federal legislation and the Commerce Clause prohibit the State of Montana from imposing *any* severance tax on the mining of coal within its borders. Indeed, appellants conceded in the Montana Supreme Court that the State may levy some tax, perhaps 12½ to 15% of the value of the coal (J.S. App. 9a). As that Court observed, appellants argue only "that at some point not specified, between fifteen to thirty percent of the value of the coal, Montana's coal severance tax butts into the lintel of federal impermissibility" (*ibid.*).

Thus, under each of their arguments, appellants ask this Court to fashion a test for the validity of state taxes that would require state and federal courts, as a matter of federal constitutional law, to calculate acceptable rates or levels of taxation of property or activities that appellants concede have traditionally been regarded as legitimate subjects of state taxation. It may be doubted whether a legal test can be fashioned that would adequately take into account the myriad—and competing—economic, geographic, demographic, social and political considerations that must inform a determination of an acceptable rate or level of state taxation, and yet be reasonably capable of application in a broad range of individual cases. But the difficulty of the judicial undertaking to one side, the nature of the fact-finding and

judgment that would be entailed only reinforces the conclusion that the appropriate level of state taxation is, under our federal system, fundamentally a political matter for legislative resolution—by the states in the first instance and, if necessary, by Congress, when particular state levies are thought to be contrary to federal interests. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979).

The present controversy has not escaped the attention of Congress. Several bills were introduced during the 96th Congress to limit the rate of state severance taxes (S. 2695, H.R. 5294, H.R. 6625, H.R. 6654 and H.R. 7163), and one was introduced to limit the rate applied to energy resources extracted from federal and Indian lands (S. 1778). On December 4, 1980, the House Committee on Interstate and Foreign Commerce reported on H.R. 6625, which would have limited state coal severance taxes to a rate of 12½%. The bill was recommended with the Montana tax specifically in mind. See H.R. Rep. No. 96-1527 (Pt. 1), 96th Cong., 2d Sess. 3-8, 14 (1980). Similar bills have been introduced in the 97th Congress (S. 178, H.R. 1313).

Appellants have urged the passage of such legislation,[1] but, failing that, they ask the courts to impose a comparable limitation. Judicial intervention is necessary, they argue, because if the Montana tax ultimately is upheld, it "foreshadows a trend in state taxation of energy resources which can only lead to the Balkanization of this Nation in the same way that OPEC's efforts have fragmented the world economy" (Br. 7; see also *id.* at 5-6, 9-10, 25). They also see in the tax a threat to a national policy favoring the use of domestic coal to meet the nation's energy needs (Br. 35-46).

We must, of course, be apprehensive of any tendency toward the Balkanization of the nation according to the relative wealth or scarcity of energy resources in the

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[1] See *Coal Severance Taxes: Hearings on H.R. 6625, H.R. 6654, and H.R. 7163 before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 93-132 (1980) (hereinafter "*Hearings*").

various regions or states. We must be concerned as well that the nation meet its energy needs and that it do so without imposing unwarranted burdens on consumers or bestowing undue windfalls on those who might seek to profit from shortage. But the issue in this case is not the economic or political wisdom of the state taxing measure under review. More is needed for a court to strike down a state statute as repugnant to the Federal Constitution than a conviction that the statute will cause disharmony among the states or is contrary to the welfare of the nation, even if it is assumed that appellants would make such a showing in this case. The focus of constitutional analysis must be on the terms of the specific constitutional and statutory provisions through which the Framers and Congress have sought to "form a more perfect Union" and "promote the general Welfare." United States Constitution, Preamble. We are unable to conclude that Montana's Coal Severance Tax is repugnant to the Commerce Clause and the specific statutory provisions upon which appellants rely or that appellants must be given an opportunity to make a factual showing before the tax may be sustained.

1. Appellants contend that the Montana tax, as applied to the mining of federally owned coal, is inconsistent with the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*, because it has the effect of diverting to the State of Montana a major portion of the revenues that would otherwise be captured by the United States. However, in Section 32 of the 1920 Act, Congress provided that "nothing in this chapter shall be construed or held to affect the rights of the States * * * to levy and collect taxes upon * * * output of mines, * * *." By virtue of Section 32, federal lessees are not "exempt from any form of state taxation otherwise lawful." *Mid-Northern Oil Co.* v. *Montana*, 268 U.S. 45, 50 (1925). The 1920 Act therefore has no independent preemptive force. In any event, the Mineral Lands Leasing Act of 1920 is intended to ensure only a "fair return" from leasing, not to maximize the re-

covery of "economic rents," with which the Montana tax could be said to interfere.

2. Appellants assert that the Montana tax is preempted because it frustrates a national "policy" favoring the use of coal. But the only specific statutory provisions —other than general prefatory language in several acts— cited by appellants are those in the Powerplant and Industrial Fuel Use Act (PIFUA) of 1978, 42 U.S.C. (Supp. III) 8301 *et seq.* But although that Act mandates the use of coal instead of oil and natural gas, it cannot, without more, be thought to manifest a clear congressional purpose to preempt state law merely because that law may make the use of coal more expensive. In any event, Section 601(a)(2) of PIFUA expressly contemplates the existence, not preemption, of severance taxes by providing that such taxes will be "taken into account" in allocating certain impact aid to the states. The legislative history reveals that this measure was drafted with the Montana tax specifically in mind.

3. We agree with appellants' argument that the coal severance tax is not immune from Commerce Clause scrutiny on the theory that mining is "local", not interstate commerce. But it does not follow that *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922), was incorrectly decided or that the Montana tax is invalid, given a state's strong interest in taxing the extraction of its depletable resources.

Appellants' contention that the Montana tax discriminates against interstate commerce because its burden is borne primarily by out-of-state consumers must be rejected. The tax is imposed at the same rate whether or not it is shipped out of state and is therefore nondiscriminatory. Moreover, appellants' argument that a tax such as this can be found to be discriminatory depends on an assertion that the state is exploiting a "monopoly" position that enables it to export the tax burden. Proof of this assertion would entail a complex economic analysis of market demand and the economic incidence of taxation and would infuse foreign principles of antitrust law into the Commerce Clause.

Finally, appellants err in arguing that the tax is not "fairly related to the services furnished by the State" under the fourth prong of the test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Contrary to appellants' assertion, this test does not require that the amount of the state tax must be roughly equivalent to the value of services the taxpayer receives in return. This Court made clear in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937), that the Due Process Clause of the Fourteenth Amendment does not require that taxes be assessed only in return for services furnished to the taxpayer, and the Commerce Clause does not require a different result merely because there is a nexus to interstate commerce. The "fairly related" test requires only that the tax be measured by or levied in "proper proportion" to the taxpayer's activities or presence in the state. The Montana tax, measured as a percentage of the value of the coal taken, plainly is in "proper proportion" to the activities of coal producers in the State.

I

AS APPLIED TO THE MINING OF FEDERALLY OWNED COAL, THE MONTANA COAL SEVERANCE TAX IS AUTHORIZED BY AND THEREFORE IS NOT PREEMPTED BY THE MINERAL LANDS LEASING ACT OF 1920

Appellants contend (Br. 45-50; Comp. ¶¶ 34-44, J.S. App. 56a-59a) that the Montana Coal Severance Tax, as applied to the mining of federally owned coal, is inconsistent with the Mineral Lands Leasing Act and therefore is invalid under the Supremacy Clause of the Constitution. They argue that under the Leasing Act of 1920, the "economic rents" attributable to the extraction of federally owned coal—*i.e.*, the difference between the market price of the coal and the cost of its production (including a reasonable profit for the producer)—are to be captured by the federal government in the form of payments made by coal producers pursuant to leases issued under the Act. The payments thus received are then to be divided between the states and the federal govern-

ment according to a statutory formula that, at present, provides for the states in which the mining occurs to receive 50% of the revenues, the reclamation fund to receive 40%, and the Treasury of the United States to retain the remaining 10%. 30 U.S.C. 191.[2]

Appellants contend that Montana's coal severance tax is so excessive in amount that it seriously undercuts and disrupts the "compromise" reflected in this division of revenues between the federal government and the states by appropriating directly to the State of Montana a major portion of the "economic rents." This is so, it is argued, because potential coal producers, "in calculating the amount they are willing to bid in royalties[3] for

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[2] Section 35 of the Mineral Lands Leasing Act, ch. 85, 41 Stat. 450, 30 U.S.C. (1970 ed.) 191, as originally enacted in 1920, provided that all money received from the leasing of public lands pursuant to the Act was to be paid into the United States Treasury and then divided as follows: 37½% to the state in which the leased lands are located to be used for roads and education; 52½% to the reclamation fund created by the Reclamation Act of 1902 (ch. 1093, Section 1, 32 Stat. 388, 43 U.S.C. 391); and the remaining 10% to miscellaneous receipts in the Treasury.

Section 35 was amended by Section 9(a) of the Federal Coal Leasing Amendments Act (FCLAA) of 1976 (Pub. L. No. 94-377, 90 Stat. 1089) to provide for the division of royalties set forth in the text. Section 35 was further amended by Section 317 of the Federal Land Policy and Management Act of 1976 (Pub. L. No. 94-579, 90 Stat. 2770) to delete the requirement that the states' share of revenues be devoted to schools and road construction and to direct the states, instead, to give priority in spending the proceeds to facilities and services in those areas of the state that would experience an economic or social impact from leasing activities.

[3] The federal government receives revenues in three principal forms: bonuses, royalties, and an annual rental charge for the acreage leased. At present, bidders compete according to the amount of *bonus* they will pay; the *royalty* is fixed. Section 7 of the Mineral Lands Leasing Act of 1920 (ch. 85, 41 Stat. 439, 30 U.S.C. (1970 ed.) 207) originally provided for payment of a royalty on federally owned coal of at least five cents per ton and an annual rental of not less than 25 cents per acre in the first year and not less than one dollar per acre after five years. (In Section 39 of the 1920 Act, 30 U.S.C. (1970 ed.) 209, as added in 1933 (ch. 45, 47 Stat. 798), and amended in 1946 (ch. 916, Sec-

federal leases, will necessarily compute the amount of state tax payable on production and must naturally reduce the amounts they are willing to bid for royalties accordingly" (Br. 47; footnote omitted).

The factual premise implicit in this argument—that the principal effect of the tax is to shift a major portion of the relatively fixed "economic rents" attributable to the extraction of federally owned coal from the Federal Treasury to the State of Montana—is inconsistent with the premises underlying their other arguments, which we address in Points II and III, *infra*. There, appellants argue that the effect of the tax is to increase the cost of Montana coal, thereby *increasing* the total amount of

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tion 10, 60 Stat. 957), Congress authorized the Secretary to waive, suspend, or reduce the rental or minimum royalty, and reduce the production royalty, whenever necessary to promote development or whenever leases cannot be operated successfully under the terms provided). Section 2(a) of the 1920 Act (ch. 85, 41 Stat. 438, 30 U.S.C. (1970 ed.) 201(a)) provided for leasing by competitive bidding—which would yield a bonus at the outset of the lease—or by such other method as the Secretary adopted. Section 2(b), ch. 85, 41 Stat. 438, 30 U.S.C. (1970 ed.) 201(b), also authorized the Secretary to issue prospecting permits where exploration was necessary to determine the existence or workability of coal deposits on particular tracts; if the permittee demonstrated the existence of coal, he was entitled to lease the tract on a noncompetitive basis. Under the original Act, then, land was not always leased on a competitive basis and, therefore, did not always yield the bonus attributable to competitive bidding.

In Section 7 of FCLAA (90 Stat. 1087), Congress increased the royalties on coal to a minimum of 12½% of market value and provided for the Secretary to establish per acre rental charges by regulation. See 43 C.F.R. 3473.3-1(a). Sections 2 and 4 of the FCLAA, 90 Stat. 1083 and 1085, amended Section 2 of the 1920 Act (30 U.S.C. (1970 ed.) 201) to require competitive bidding in all cases, see 45 Fed. Reg. 84928 (1980), and to replace the prospecting permit-leasing system with a system of exploration under licenses issued by the Secretary that give no right or preference to a subsequent lease. See 43 CFR. 3430.0-7. The FCLAA also retained the authority of the Secretary in Section 39 of the Mineral Lands Leasing Act of 1920 to waive, suspend, or reduce rental or royalty payments, but, in Section 14 of the FCLAA (90 Stat. 1091), added a proviso barring the Secretary from waiving *advance* royalties.

"economic rents," and that the burden of the tax is borne by out-of-state consumers, not the Federal Treasury. Indeed, appellants allege that the existing contracts between the 11 appellant utility companies and the four appellant coal producers *require* that the utility companies reimburse the coal producers for their severance tax payments and that the ultimate burden of the tax falls upon the utilities' customers (Comp. ¶¶ 17, 18; J.S. App. 53a-54a). As to these contracts, then, the federal government's revenues presumably will be substantially unaffected by the tax, particularly because the bonuses, royalties, and rentals to be paid to the federal government would have been established in leases entered into before the coal producers commenced mining to satisfy their contracts with the utilities.

However, even if it is conceded that the Montana Coal Severance Tax may have some impact on the total income received by the federal government under leases entered into in Montana, this hardly proves that the tax is inconsistent with the Mineral Lands Leasing Act.[4] Indeed, the most basic obstacle to any such conclusion is that, in Section 32 of the 1920 Act (30, U.S.C. 189), Congress authorized the states to collect severance taxes

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[4] On new leases, it does seem likely that the burden of the severance tax will be shared among the Federal Treasury, coal producers, and ultimate consumers. As the Montana Supreme Court observed (J.S. App. 24a), it cannot be assumed that all of the tax would be passed on to consumers, through utilities, because Montana does not have a monopoly in the production of coal. Its coal must compete with that produced in Wyoming, North Dakota, and elsewhere. See also U.S. Dep't of Justice, Antitrust Division, *Competition in the Coal Industry*, 25-31 (1980). Therefore, the state's tax might well diminish to some extent the amount a coal producer is prepared to pay to the federal government. R. Posner, *Economic Analysis of Law* 367 (2d ed. 1977). It is not clear, however, what cause appellants have to complain about an asserted distortion in the division of "economic rents." That would appear to be a matter between the United States and the State of Montana. Cf. *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974).

without imposing any express limitation on the amount of such taxes.

Section 32 provides, in pertinent part:

> Nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.

In construing Section 32 soon after its enactment, this Court stated:

> Congress, having provided for leasing the public lands to private corporations and persons whose property, income, business and occupations ordinarily were subject to state taxation, meant by the proviso to say in effect that, although the act deals with the letting of public lands and the relations of the government to the lessees thereof, nothing in it shall be so construed as to affect the right of the states, in respect of such private persons and corporations, *to levy and collect taxes as though the government were not concerned.*
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> * * * * *
>
> * * * We think the proviso plainly discloses the intention of Congress that *persons and corporations contracting with the United States under the act, should not, for that reason, be exempt from any form of state taxation otherwise lawful.*

Mid-Northern Oil Co. v. *Montana*, 268 U.S. 45, 48-50 (1925) (emphasis added). It is plain, then, that for purposes of a state's power to tax, the lessees of federal lands are to be treated the same as lessees of private lands.[5] It necessarily follows that if the Montana Coal

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[5] Treating the lessees of federally owned lands, for taxing purposes, *as if* they were lessees of privately owned lands is consistent with the background of the 1920 Act, which reflects a compromise between those Members of Congress who believed the lands should

Severance Tax is "otherwise lawful" (*Mid-Northern Oil Co.* v. *Montana, supra,* 268 U.S. at 50)—*i.e.*, in the present case, if the tax does not conflict with federal energy legislation or the requirements of the Commerce Clause—those appellants who are "contracting with the United States under the [Leasing Act], should not, for that reason, be exempt" from the severance tax. 268 U.S. at 50.[6]

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be retained in public ownership and those who believed the lands should be sold into private hands.

Mineral lands leasing legislation was first introduced in 1914. H.R. 16136, S. 4898, 63d Cong., 2d Sess. (1914). Controversy over the loss of state revenues was a major obstacle to the bill's passage. Representatives of the western states in which the mineral lands were located claimed that retention of the lands in federal ownership was a violation of the Equal Footing Doctrine because, in their view, the states had entered the Union upon a solemn compact that lands would be "allowed to go into private ownership to help maintain the State government * * *." H.R. Rep. No. 668 (Pt. 2), 63d Cong., 2d Sess. 6 (1914) (minority views). They complained that their states would lose large amounts of real estate tax revenues that royalties would not replace, and they questioned whether states had the authority to receive revenue from output taxes instead. See 51 Cong. Rec. 14953, 14954-14955, 15039, 15055, 15060 (1914). Sponsors of the legislation responded that the royalties would compensate the states for loss of real estate tax revenues and that, of course, the states possessed the power to tax the output of the mines in the same manner as minerals taken from private lands. See *id.* at 15064-15065, 15558-15559. See also 53 Cong. Rec. 980-981 (1916).

In 1919, the legislation which was eventually to become the Mineral Lands Leasing Act of 1920 was introduced. S. 2775, 66th Cong., 1st Sess. (1919). The debates between supporters and opponents of the bill were similar to those that had occurred five years earlier. See, *e.g.* 58 Cong. Rec. 7770-7774 (1919); see generally P. Gates, *History of Public Land Law Development* 738-745 (1968) (published by the Public Land Law Rev. Comm.).

[6] This conclusion is fully compatible with the decision in *Ventura County* v. *Gulf Oil Corp.*, 601 F.2d 1080 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980). There, the Ninth Circuit found that the Mineral Lands Leasing Act preempted county zoning ordinances that required oil and gas operators on federal lands to obtain county drilling and exploration permits. Montana is not purporting to

In the Federal Coal Leasing Amendments Act of 1976, Congress amended the Mineral Lands Leasing Act in a number of respects, by, *e.g.*, increasing the royalty rate, allocating a greater portion of royalties to the states, and providing for competitive bidding under all circumstances. See note 2, *supra*. The legislative history reveals that Congress was aware of Montana's severance tax. For example, Senator Metcalf, the floor manager of the bill, stated in response to criticism of the increase in the royalty rate:

> There is no evidence to support the allegation that a 12.5-percent minimum royalty would preclude coal development on Federal lands. On the contrary, this proposed rate is entirely commensurate with royalties and taxes already on the books. *The State of Montana recently enacted coal taxes above 20 to 30 percent—depending on the quality of the coal—with no significant reduction to coal production evident.*

122 Cong. Rec. 19376 (1976) (emphasis added).[7] Congress' failure, in these circumstances, to amend Section

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prohibit or regulate the manner of leasing that Congress has specifically authorized. Furthermore, in contrast to the express authorization of state taxation contained in Section 32 of the 1920 Act, the federal statutory scheme for oil and gas leasing contains no explicit provision allowing state permit systems such as that involved in *Ventura County*.

[7] See also 122 Cong. Rec. 515 (1976) (Rep. Mink) (noting that severance taxes are paid in Montana on the mining of federally owned coal and that the legality of such taxes will be litigated, but that the matter of states taxes "is not covered" by the 1976 legislation); *id.* at 519 (Rep. Myers) ("[a]lthough coal is mined on Federal land leases, the States still can inflict whatever taxes they want on the corporation for the coal that comes out of the Federal Lands").

In House oversight hearings on the federal coal leasing program held in the Spring of 1976, before the 1976 amendments were passed, an Interior Department witness informed the subcommittee of the Department's view that Montana's authority to impose the 30% tax was "expressly reserved in the Mineral Leasing Act" and that "barring a finding by the courts that it might be unconstitutional, that is clearly within the State's authority." ***Oversight on Federal Coal Leasing: Oversight Hearings Before***

32 of the Mineral Lands Leasing Act of 1920 reinforces the view that the Montana tax is valid. This same view is reflected in the recent House committee report on the bill to limit the Montana severance tax to a rate of 12½% (see page 2, *supra*), which concludes that "the States are given the right to tax [production of federal coal] in the same manner and to the same extent as if Federal lands were not included." H.R. Rep. No. 96-1527 (Pt. I), *supra*, at 8. We therefore do not find in the language, legislative history, or legislative, executive, and judicial interpretation of the Mineral Lands Leasing Act of 1920 and the 1976 amendments to that Act any basis for concluding that Montana's coal severance tax cannot be applied to the extraction of federally owned coal in the State.

Nor do we find any support for such a conclusion in appellants' largely theoretical proposition that Congress intended to maximize and capture (through bonuses, royalties, and rents) all "economic rents" attributable to extraction of federally owned coal and then to distribute the proceeds according to the formula set forth in Section 35 of the 1920 Act, 30 U.S.C. 191. Appellants cite nothing in the language or legislative history of the Act or the 1976 amendments to support their argument, and we are aware of nothing. The House Report on the 1976 amendments, for example, expresses a congressional intent to secure only a "fair return to the public" (H.R. Rep. No. 94-681, 94th Cong., 1st Sess. 17-18 (1975)), not whatever return the federal government's dominant position in the western coal market might command. This purpose is reflected as well in regulations recently issued

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the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs, 94th Cong., 2d Sess. 65 (1976). See also *id.* at 91. The Department did note, however, that in some circumstances, courts have found that legislative measures "set forth as exercises of the taxing authority have in fact had as their principal purpose the prohibition of the activity so regulated" and that it "would be assumed that the same legal principles and test would be applicable to the State severance taxes imposed upon the mining of coal." *Id.* at 91.

by the Department of Energy that identify the "purposes and policies" that Department will consider in determining whether to disapprove certain terms and conditions in leases to be issued by the Secretary of the Interior. See 42 U.S.C. (Supp. II) 7152(b) and 7153. These "purposes and policies" include providing a "fair return" to the federal government, as well as fostering production and minimizing coal prices. Although the Department notes that it will consider the "relationship between economic rent and government revenue," this is only one of 21 factors that will be taken into account. See 10 C.F.R. 378.111, as added, 45 Fed. Reg. 84933 (1980).[8]

Even if we were able to agree, however, that Congress sought in general to maximize the return from federal leases, we still could not agree with appellants' argument that Montana's tax may not be applied to federally owned coal. That argument necessarily depends on inferences to be drawn from Sections 7 and 35 of the 1920 Act (30 U.S.C. 207 and 191), which, as amended, provide for increased bonuses and royalties and a more favorable allocation of those proceeds to the states. Comp. ¶¶ 38-41; J.S. App. 57a-58a. Yet Section 32 of the 1920 Act pro-

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[8] Section 2(a) of the Act, 30 U.S.C. 201(a), also provides that no lease shall be issued for less than "fair market value." This term is defined in a regulation issued by the Secretary, 43 C.F.R. 3400.0-5(s), and further elaborated upon in *Secretarial Issue Document; Fair Market Value and Minimum Acceptable Bids on Federal Coal Leases*, C-1 (May 28, 1980). It is clear from the latter that the Interior Department does not seek to obtain the maximum revenue. See *Competition in the Coal Industry*, note 4, *supra*, at 8-10 & n.24.

The government has established production projections for western coal regions. U.S. Dept. of the Interior, *Final Environmental Statement: Federal Coal Management Program* 2-32 (1979). In establishing its production targets, however, the Department takes into account that Montana and other western states impose severance taxes. See International Consulting Firm, Inc., *Final Report, the Demand for Western Coal and Its Sensitivity to Key Uncertainties* 15 (1978) (used by the Department to set coal production goals).

vides that "[*n*]*othing* in this Act"—which must include Sections 7 and 32—"shall be construed or held to affect the rights of the States * * * to levy and collect taxes upon * * * output of mines." 30 U.S.C. 189 (emphasis added). And if, as this Court has held, the states are authorized "to levy and collect taxes as though the government were not concerned" (*Mid-Northern Oil Co.* v. *Montana, supra*, 268 U.S. at 49), it necessarily follows that the particular manner in which the federal government collects payments from its lessees and then shares them with the states has no more bearing upon the validity of the state tax than does the manner in which a private lessor collects and spends his proceeds.[9]

II

THE MONTANA COAL SEVERANCE TAX IS NOT PREEMPTED BY THE FEDERAL POLICY FAVORING THE USE OF COAL

Appellants argue (Br. 35-46) that, as applied to both federally and nonfederally owned coal, the Montana Coal

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[9] Different considerations are raised in the application of the tax to coal owned by Indian tribes in Montana. As we have pointed out in our brief in *Merrion* v. *Jicarilla Apache Tribe* and *Amoco Production Co. and Marathon Oil Co.* v. *Jicarilla Apache Tribe* (Nos. 80-11 and 80-15), at 22-23 n.16, and as amicus Crow Tribe of Indians points out in its brief in this case, the Indian Mineral Leasing Act of 1938 (ch. 198, 52 Stat. 347, 25 U.S.C. 396a-396g) does not contain an express authorization of state taxation similar to that in Section 32 of the Mineral Lands Leasing Act. Moreover, the legislative history of the 1938 Act, unlike that of the 1920 Act and amendments thereto, reflects an intent to maximize the return from the leasing of Indian lands. S. Rep. No. 985, 75th Cong., 1st Sess. 2-3 (1937); H.R. Rep. No. 1872, 75th Cong., 3d Sess. 1-3 (1938). Finally, this Court has made clear that the standards of preemption applicable to federal laws regulating Indian affairs are different from those that have been applied in other areas. See, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, No. 78-1177 (June 27, 1980), slip op. 6-7. The validity of the Montana tax as applied to mining of coal owned by the Crow Tribe is in issue in *Crow Tribe of Indians* v. *State of Montana*, No. 79-4321 (9th Cir., argued on Jan. 14, 1980), which has been argued and is under submission to the court of appeals. We have appeared *amicus curiae* in support of the Tribe in that case.

Severance Tax "[s]ubstantially [f]rustrates" national policy favoring the use of coal. But, of course, only so far as that "policy" is translated into congressional legislation can it have the effect of preempting state laws under the Supremacy Clause. Statements and reports by Executive Branch officials (see Br. 36 & n.**), have no independent preemptive force. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952).

Appellants do observe (Br. 36 n.**), correctly, that Section 2(6) of the Energy Policy and Conservation Act of 1975 (Pub. L. No. 94-163, 89 Stat. 871, 42 U.S.C. 6201(6)) declares it to be one of the purposes of that Act "to reduce the demand for petroleum products and natural gas through programs designed to provide greater availability and use of this Nation's abundant coal resources." Appellants are also correct (Br. 37, 44 n.*) that Section 102(b)(3) of the Powerplant and Industrial Fuel Use Act (PIFUA) of 1978 (Pub. L. 95-620, 92 Stat. 3289, 42 U.S.C. (Supp. III) 8301(b)(3)) recites a like objective "to encourage and foster the greater use of coal and other alternative fuels, in lieu of natural gas and petroleum, as a primary energy source." But surely these general statements, standing alone, cannot be thought to have preempted all state legislation that may have an adverse impact on the use of coal. Like preambles to statutes, such declarations ordinarily "do not constitute an exertion of the *will* of Congress which is legislation, but a recital of considerations which in the opinion of that body existed and justified the expression of its will" in other portions of the legislation. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 290 (1936).[10] It is

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[10] See also *Yazoo & Mississippi Valley R.R.* v. *Thomas*, 132 U.S. 174, 188 (1889); *Ass'n of American Railroads* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Bissette* v. *Colonial Mortgage Co.*, 477 F.2d. 1245, 1246 n.2 (D.C. Cir. 1973); *Lehigh & New England Ry.* v. *ICC*, 540 F.2d 71, 79 (3d Cir. 1976), cert. denied, 429 U.S. 1061 (1977); *Hughes Tool Co.* v. *Meier*, 486 F.2d 593, 596 (10th Cir. 1973); 1A C. Sands, *Sutherland Statutes and Statutory Construction*, §§ 20.02, 20.09 (4th ed. 1972); cf. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 201-203 (1962); *Lauf* v. *E. G. Shinner &*

therefore necessary to look beyond such general expressions of "national policy" to specific provisions of federal statutes with which the state law is said to conflict. *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133-134 (1978).[11] The only specific statutory provisions favoring the use of coal cited by appellants are those in PIFUA.

PIFUA prohibits any new electric powerplant or new major fuel-burning installation (MFBI) consisting of a boiler from using natural gas or petroleum as a primary energy source. 42 U.S.C. (Supp. III) 8311(1), 8312(a). The Act also prohibits all existing electric powerplants from using natural gas as a primary energy source after January 1, 1990, and gives the Secretary of Energy discretionary authority to prohibit existing powerplants from burning natural gas or oil if he determines (1) that the plants are technically and financially capable of using coal or another alternate fuel as a primary energy source and (2) that such substitution of fuels will not require substantial physical modification of the facility or cause a substantial decrease in the facility's capacity. 42 U.S.C. (Supp. III) 8341-8343. Because PIFUA, where it applies, *mandates* the use of coal, we do not believe that an increase in the price of coal occasioned by the severance tax can be said to "stand[]

Co., 303 U.S. 323, 330 (1938). As this Court stated in another context, "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

[11] In *Exxon Corp.*, the Court rejected an analogous argument that the "basic national policy favoring free competition" reflected in the Sherman Act preempted a state statute governing the retail distribution of gasoline. Contrary to appellants' suggestion (Br. 44 n.*), this aspect of the holding was not dependent on a *factual determination* that the Maryland statute did not substantially frustrate that "policy." Rather, the Court held that the broad policy did not have a preemptive force, irrespective of whatever factual showing might have been made about the state law's anticompetitive effect. Elsewhere in the opinion the Court considered the more focused allegations of conflict with specific provisions of the Robinson-Patman Act. 437 U.S. at 129-133.

as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" merely because it may make conversion to coal more expensive. See Br. 42, quoting *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), and *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1974). Appellant utilities, for example, continue to burn coal; they have not substituted oil or natural gas.

There are, to be sure, a number of temporary and permanent exemptions from PIFUA's requirements. 42 U.S.C. (Supp. III) 8321-8322, 8341-8352. See Comment, *The Powerplant and Industrial Fuel Use Act of 1978: Fuel Replacement*, 3 Harv. Envt'l L. Rev. 214, 229 (1979). Temporary and permanent exemptions are available to both existing and new electric powerplants and MFBI's if the Secretary determines that an adequate and reliable supply of coal or other alternate fuel is available only at a cost substantially exceeding the cost of petroleum. 42 U.S.C. (Supp. III) 8321(a)(1), 8321(e)(2)(A), 8322(a)(1)(A), 8351(a)(1), 8351(h)(2)(A), 8352(a)(1)(A). Moreover, the Secretary's authority to mandate fuel replacement for existing powerplants and MFBI's is limited, because he must first determine that "it is financially feasible to use coal or another alternate fuel as a primary energy source * * *." 42 U.S.C. (Supp. III) 8341(b)(3) and 8342(a)(3). Because of these exceptions that take cost into account in certain respects, it is conceivable that an increase in the price of coal occasioned by severance taxes imposed by Montana or other states might result in excusing a powerplant or MFBI from using coal.[12] But the Act does not regulate or prohibit price increases imposed by coal producers

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[12] As the Montana Supreme Court observed, however (J.S. App. 23a-24a), because of high transportation charges, the severance tax—although imposed at a rate of 30% of market value in Montana—constitutes a far smaller percentage of the value of the coal when delivered to an out-of-state utility. The portion of the ultimate cost of electricity to the consumer that is attributable to the Montana tax is estimated by Montana officials to be even lower, amounting to no more than 2% (Table II) of a customer's electricity bill. See *Hearings*, note 1, *supra*, at 38.

themselves, which could have a similar effect; we therefore cannot find in these provisions that expressly *accommodate* price increases an implicit congressional intent to prohibit those particular increases that are caused by severance taxes.[13] Much less, can we discern in the Act a standard for determining a particular amount which such taxes may not exceed.[14]

Whatever the potential for the Montana tax to slow the increase in the use of coal by powerplants and

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[13] The statute reveals in other respects a congressional reluctance to override state and local laws even though they might discourage utilization of coal. Temporary and permanent exemptions are available for new and existing powerplants and MFBIs if "the prohibitions * * * could not be satisfied without violating applicable environmental requirements." 42 U.S.C. (Supp. III) 8321(a)(3), 8322(a)(1)(C), 8351(a)(3), 8352(a)(1)(C). The term "applicable environmental requirements" is defined to include requirements of state law. 42 U.S.C. (Supp. III) § 8302(a)(17)(A). In addition, the statute provides for permanent exemptions in certain circumstances if the Secretary determines that operation of the facility would be infeasible because of state and local requirements. 42 U.S.C. (Supp. III) 8322(b), 8352(b). See H.R. Conf. Rep. No. 95-1749, 95th Cong., 2d Sess. 76-77 (1978).

[14] This is in sharp contrast to state tax measures which intrude into pervasive federal control of the distribution and price of natural gas, such as Louisiana's "first use" tax, at issue in *Maryland* v. *Lousiana*, No. 83 Original (argued Jan. 19, 1981). See also, *New England Power Co.* v. *New Hampshire Public Utilities Comm'n*, No. 80-1208 (pending on appeal).

In the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3352, which was enacted together with PIFUA, Congress imposed controls on the wellhead price of natural gas. 15 U.S.C. (Supp. III) 3311-3320. However, in Section 110(a)(1) of the Act, 15 U.S.C. (Supp. III) 3320(a)(1), Congress provided that the price for the first sale of natural gas may exceed the maximum lawful price where necessary to recover "State severance taxes attributable to the production of such natural gas and borne by the seller," although any such tax enacted after December 1, 1977, must treat natural gas destined for interstate commerce and that destined for intrastate sale alike. Thus, even where Congress has sought to regulate the price of natural resources, it likewise has accommodated, not prohibited, state severance taxes.

MBFIs, however, we believe it is clear from the face of the Act that Congress did not intend PIFUA to preempt the Montana tax. Section 601(a)(1) of PIFUA, 42 U.S.C. (Supp. III) 8401(a)(1), provides for the furnishing of financial assistance to those areas of a state that are adversely affected by increased coal or uranium mining if the governor of the state finds that increases in employment have required or will require substantial increases in housing or public facilities and services and that the state or local government lacks the financial and other resources to satisfy those needs within a reasonable time. Section 601(a)(2) then provides that

> increased revenues, *including severance tax revenues*, royalties, and similar fees to the State and local governments which are associated with the increase in coal or uranium development activities and which are not prohibited from being used under provisions of law in effect on the date of the enactment of the Act shall be taken into account in determining if a State or local government lacks financial resources.

42 U.S.C. (Supp. III) 8401(a)(2) (emphasis added). On its face, this Section contemplates the continued existence, not preemption, of state severance taxes on coal.

Appellants may argue that Section 601(a)(2) does not demonstrate a congressional intent to tolerate state severance taxes of *any* amount, no matter how disruptive of the coal conversion program. But at least as regards the particular tax in suit, that argument is difficult to square with the notoriety of the Montana tax, enacted only a few years earlier and the subject of continuing controversy. Moreover, as it happens, the legislative history of Section 601(a)(2) reveals that it was framed with Montana's tax specifically in mind.

The PIFUA bill that passed the Senate contained an impact aid section, but the House bill did not. H.R. Conf. Rep. No. 95-1749, 95th Cong., 2d Sess. 93 (1978). The transcript of the meetings of the Joint Conference on Energy reveals that the Senate's impact aid section met

with resistance on the part of the House conferees, who believed that the states would be able to satisfy the demand for facilities and services occasioned by increased coal production through imposition of severance taxes and, in the western states, through their share of royalties received under the Mineral Lands Leasing Act from the extraction of federally owned coal. See Transcript of the Joint Conference on Energy, at 1822, 1824, 1832, 1834-1837, 1839 (Nov. 9, 1977), reprinted in U.S. Department of Energy, *Legislative History of the Powerplant and Industrial Fuel Use Act*, Vol. II, 777, 779, 787, 789-792, 794 (1978). Representative Eckhardt noted that the western states receive a share of royalties under the Mineral Lands Leasing Act, increased in 1976, for impacted areas of the states and that

> * * * in addition to that, the western states may collect severance taxes on that coal.
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> As I pointed out [see Tr. 1822; *Legislative History* at 777], Montana already collects $3 a ton on severance taxes on coal and still enjoys a 50 percent royalty return. As the price of coal goes up, just as the price of oil went up, those severance taxes in addition go up.
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> This is a percentage tax, not a flat tax in most instances.
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> If we are going to merely determine on the basis of impact on a particular community in a state how much money is going to go to that community, without taking into account how much that community is enriched, I think that we are going to have people who are so angry at us in Congress * * *.

Tr. 1835; *Legislative History* at 790. Section 601(a)(2), which provides that severance taxes and royalties shall be "taken into account" in distributing impact aid, obviously was drafted to meet the objections of Representative Eckhardt and other conferees. The understanding of the conferees therefore underscores what seems evident from the face of Section 601(a)(2)—that Montana's severance tax is not preempted by PIFUA. Because PIFUA is the only statute seriously relied upon by appellants

as setting forth a preemptive policy favoring the use of coal, appellants' preemption argument must fail.[15]

III

THE MONTANA COAL SEVERANCE TAX IS NOT UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE

Appellants argue, finally, that the Montana Coal Severance Tax is invalid under the Interstate Commerce Clause. They contend (Br. 17-26) that the Montana Supreme Court erred in concluding (J.S. App. 8a-18a) that the tax does not violate the Commerce Clause because, under this Court's decision in *Heisler* v. *Thomas Colliery Co.*, 260 U.S. 245 (1922), the severance of coal is a taxable event that precedes entry of the coal into interstate commerce. Instead, it is argued (Br. 27-34), the severance tax should be scrutinized under the four-part test this Court articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)—whether the tax

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[15] Appellants also contend (Br. 37-41) that the Montana tax is preempted by the Clean Air Act, 42 U.S.C. (& Supp. III) 7401 *et seq.* But the Clean Air Act does not mandate the use of coal; it merely establishes standards for the emission of sulfur dioxide when coal is used. Any affect those standards might have on the market for high and low sulfur coal is incidental and not a matter of affirmative congressional intent. Indeed, when it amended the Act in 1977 (see Pub. L. No. 95-190, Section 14(a)(7)-(9), 91 Stat. 1399, amending Section 111 of the Clean Air Act, 42 U.S.C. (Supp. III) 7411), Congress made clear its intent to *remove* any special incentives previously created by the Act to prefer low sulfur coal mined in the west. See, *e.g.*, H.R. Rep. No. 95-299, 95th Cong., 1st Sess. 166 (1977); see also Pub. L. No. 95-95, Section 120(a), 91 Stat. 720, 42 U.S.C. (Supp. III) 7421. Accordingly, in promulgating new source performance standards (40 C.F.R. 60.40(a)-60.49a(a)), EPA has taken into account the economic impact the standards might have on regional coal markets and has followed the congressional intent not to discourage the use of high sulfur coal. See, *e.g.*, 43 Fed. Reg. 42160 (1978); 44 Fed. Reg. 33583, 33596 (1979); 45 Fed. Reg. 8213 (1980). We would be reluctant in any event to ascribe to Congress an intent implicitly to divest Montana of the power to impose a tax on its coal while, under appellants' argument, an eastern state would remain free to impose the very same tax on its high sulfur coal.

"is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

Appellants do not dispute that the first two prongs of the *Complete Auto* test are satisfied. As the Montana Supreme Court observed, "there can be no argument here that a substantial, in fact, the only nexus of the severance of coal is established in Montana" (J.S. App. 20a). Nor can there be any question of apportionment or potential for multiple taxation, for again, as the state court observed, "the severance can occur in no other state" and "no other state can tax the severance" (*ibid.*). See also *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, No. 79-509 (June 10, 1980), slip op. 19-20 n.12. Appellants do argue, however, that the tax discriminates against interstate commerce because over 90% of the coal mined in Montana is shipped out of state and, consequently, out-of-state customers bear most of the burden of the tax. They also argue that the tax is not "fairly related" to the services coal producing companies receive from the State of Montana.

These arguments are not without force in a time of scarce energy resources, particularly in view of the uneven distribution of those resources among the states. And, at least on first impression, the rivalry among the states appellants portray does seem to be of the kind that the Commerce Clause was intended to prevent. See, *e.g.*, *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 532-535 (1949). In the end, however, we conclude that appellants' arguments should be rejected.

1. As an initial matter, we agree with appellants (Br. 17-26) that Montana's severance tax is not altogether immune from Commerce Clause scrutiny on the theory that mining is a purely "local" activity. Wholly intrastate activities are subject to the reach of Congress' authority under the Commerce Clause where those activities affect interstate commerce, see, *e.g.*, *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232,

241 (1980); *Wickard* v. *Filburn*, 317 U.S. 111, 124 (1942), and we see no reason why, in appropriate cases, the "negative implication" of the Commerce Clause cannot likewise reach activities formerly regarded as peculiarly "local" in nature. See *Lewis* v. *B T Investment Managers, Inc.*, No. 79-45 (June 9, 1980), slip op. 8-11; *Hughes* v. *Oklahoma*, *supra*, 441 U.S. at 326 n.2; *Philadelphia* v. *New Jersey*, 437 U.S. 617, 622-623 (1978). Accordingly, we agree that the *reasoning* in *Heisler* and its progeny has been eroded.

It does not follow, however, that *Heisler* itself was wrongly decided or that the deference owed to a state's compelling interest in taxing mining activities within its borders, which underlay the *Heisler* decision (260 U.S. at 258-259), is entitled to any less weight if the formalistic and categorical approach of the *Heisler* decision is abandoned. In the present case, for example, the *entire value* of the resource, before transportation, originates in Montana, and the mining of coal depletes the resource base and wealth of the State, thereby diminishing a source of taxes and economic activity in the future. Indeed, in many respects, a severance tax is akin to a real property tax, which it has never been doubted is a legitimate means of raising revenue by a situs state—quite apart from the distinct right of that or other states to tax income derived from the use of property or production of natural resources. See, *e.g.*, *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 19-20 n.12.

2. Appellants argue (Br. 33-34), however, that because most coal mined in Montana is shipped out of state, the effect of the tax is to shift the tax burden to consumers in other states and, thereby, to discriminate against interstate commerce. But the Montana tax is computed at the same rate whether the coal is destined for consumption inside or outside the state, and appellants do not argue that this even-handed approach is not followed in practice. We are, therefore, not presented here with the type of unequal treatment of goods shipped into or out of the state, or of persons residing in other states, that the Court has found in other cases to be

"discriminatory" for Commerce Clause purposes. See, *e.g.*, *Lewis* v. *B T Investment Managers, Inc.*, *supra*; *Hughes* v. *Oklahoma*, *supra*; *Philadelphia* v. *New Jersey*, *supra*.

The premise of the Court's prior discrimination cases is that the Framers intended, through the Commerce Clause, to create a "national common market" (*Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977)) and "an area of free trade among the several States" (*McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944)). Under such a regime, the borders between states are essentially irrelevant. See, *e.g.*, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331-332 (1977); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911). It would therefore constitute a considerable departure from the rationale of prior discrimination cases to hold the facially neutral Montana tax invalid solely by attaching significance to the fact that most coal mined in Montana crosses the very state borders that ordinarily are to be regarded as irrelevant.

Further, the argument that a tax is discriminatory because its burden is borne primarily by consumers in other states is precisely that advanced by the *amici* states in *Heisler*. There it was argued that Pennsylvania had a virtual monopoly on anthracite coal and that, because 80% of the coal was shipped out of state, the tax discriminated against and impermissibly burdened interstate commerce. 260 U.S. at 251-253; see also *Oliver Iron Mining Co.* v. *Lord*, 262 U.S. 172, 177-179 (1923). The Court was singularly unimpressed with these factors, terming them "adventitious considerations." 260 U.S. at 259. Although we believe that the basis of the Court's rejection of these arguments in *Heisler*—that mining is not interstate commerce—should not be followed, the Court's evident misgivings about judging the validity of a state tax by assessing the state's "monopoly" position or the "exportation" of the burden out of state are equally valid today.

The threshold questions whether the state in fact has a "monopoly" position and whether the burden of the

levy is shifted forward principally to out-of-state consumers, rather than borne by in-state producers or others, would themselves entail a complex factual inquiry, including a consideration of alternate sources of supply for the product and the elasticity of demand. Hellerstein, *Constitutional Constraints on State and Local Taxation of Energy Resources*, 31 Nat'l Tax J. 245, 248-249 (1978); R. Posner, *Economic Analysis of Law* 367, 510-514 (2d ed. 1977); *Developments in the Law, Federal Limitations on State Taxation of Interstate Business*, 75 Harv. L. Rev. 953, 968-970 (1962). But even if the "formidable evidentiary difficulties" did not "make the Court's inquiry futile" (*Developments, supra*, 75 Harv. L. Rev. at 970; see also Hellerstein, *supra*, 31 Nat'l Tax J. at 249), it is not apparent that the Commerce Clause was intended to impose this additional condition on the constitutionality of facially non-discriminatory taxes. Nor is it apparent that the Clause was intended to infuse principles of antitrust law into relations between the states by reference to such vague standards as whether one state is "exploiting" a "monopoly" of a natural resource or other commodity where the flow of commerce among them is not otherwise impeded.[16]

It should be noted, finally, that appellants' argument that the tax discriminates against interstate commerce because its burden is "exported" to out-of-state is not

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[16] Indeed, at bottom, appellants' argument that Montana may not exploit its "monopoly" position by exporting a tax burden to out-of-state customers is not that the Commerce Clause *shields* them from discriminatory treatment, for there is no true discrimination present in this case. Rather, it is that the Commerce Clause operates as a *sword* to give persons residing in one state a right of access at reasonable rates to natural resources located in another state that has a wealth of such resources, irrespective of whether or on what terms the residents of the resource-rich state have access to the resources. See *Developments, supra*, at 970; Hellerstein, *supra*, 31 Nat'l Tax J. at 250-251. Cf. *Reeves, Inc.* v. *Stake*, No. 79-677 (June 19, 1980), slip op. 14-15. We doubt that the Commerce Clause, of its own force, was intended to allow one state, or its residents, to control the terms of resource development and depletion in a sister state in this fashion. Cf. *Philadelphia* v. *New Jersey, supra*, 437 U.S. at 626.

logically dependent on the *amount* of the tax. In *Heisler*, for example, the claim was that *no* special severance tax could be imposed on coal primarily destined for interstate commerce. But the Court has since made clear that even interstate commerce must pay its way. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250-254 (1938). Accordingly, it must be conceded, as appellants have done, that Montana may impose *some* severance tax on the mining of coal. See Hellerstein, *supra*, 31 Nat'l Tax J. at 249. Appellants therefore apparently ask the court to adopt a new and more complex test of discrimination: a state's severance tax that is borne by out-of-state consumers may not substantially exceed the amount necessary to recoup the state's costs associated with the mining. *Ibid.*, cited at Br. 33. But this is merely a variant of appellants' argument that the Montana tax is not fairly related to the services provided by the State. It is to this argument that we now turn.

3. Appellants contend (Br. 29-33; Comp. ¶ 26, J.S. App. 55a) that the Montana tax is not "fairly related to the benefits and services provided by the State" within the meaning of the fourth prong of the *Complete Auto* test and that they were entitled to a trial on the issue. They assert (Br. 12) that they expected to show at trial that the "legitimate local impact" costs of coal mining—additional schools, roads, and police, fire, health, and environmental protection—might amount to 2¢ per ton, as compared to average revenue of over $2 per ton realized under the severance tax.[17] Because of this alleged disparity, appellants argue that the Montana legislature "grossly overreached" in imposing a tax at a rate of up to 30% (Br. 31). In our view, however, appellants misapprehend the nature of the "fairly related" prong of the *Complete Auto* test.

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[17] If the "legitimate local impact" costs of mining (which appellants contend must be the measure of the state's severance tax) amount to only 2¢ per ton of coal taken, it is not clear how appellants could concede in the Montana Supreme Court that a severance tax at a rate of between 12½ and 15% would not violate the Commerce Clause. See J.S. App. 9a.

Contrary to appellants' apparent suggestion, the Court did not state or even intimate in *Complete Auto* that the *amount* of a state tax having some impact on interstate commerce must itself be fairly related or roughly equivalent to the *value* of the services provided by the state; the words "amount" and "value" were not even used. 430 U.S. at 279.[18] And, at least in the context of the present case, a rule requiring an equivalence between benefits and burdens would constitute a radical departure from the Court's traditional view of a state's taxing power:

> Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937); see also *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 373 (1974).

We do not believe that the latitude afforded the states under the Due Process Clause of the Fourteenth Amendment to decline to assess taxes on the basis of the benefits conferred is implicitly divested by the Commerce Clause merely because the person or activity taxed has a nexus to interstate commerce. And we do not read the "fairly related" language in *Complete Auto* to accomplish this extraordinary result. As this Court has observed, " '[i]t

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[18] See also *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, *supra*, slip op. 19; *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 444-445 (1979); *Washington Revenue Dep't* v. *Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Nat'l Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 558 (1977).

was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.'" *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 108 (1975), quoting *Western Livestock* v. *Bureau of Revenue*, *supra*, 303 U.S. at 254. In our view, where, as here, the state tax does not discriminate against interstate commerce and is fairly apportioned to activities occurring within the state, the "just share of state tax burden" for those engaged in interstate commerce is essentially a matter for the legislature of the state to determine in "pursu[ing] its own fiscal policies" (*Colonial Pipeline Co.* v. *Traigle*, *supra*, 421 U.S. at 108 n.6, quoting *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1970). As the Court stated in *Traigle* (421 U.S. at 108-109, quoting *General Motors Corp.* v. *Washington*, 377 U.S. 436, 440-441 (1964)):

> [T]he validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant[s'] activities within the State and to appellant[s'] consequent enjoyment of the opportunities and protections which the State has afforded. * * * As was said in *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'

The fourth prong of the *Complete Auto* test—whether the tax is "fairly related to the services furnished by the State"—is derived from *General Motors*, *J. C. Penney*, and similar cases. See 430 U.S. at 279 n.8; see also *Nat'l Geographic Society* v. *California Board of Equalization*, 430 U.S. 551, 558 (1977). In practical effect, it is an elaboration upon the first prong of the *Complete Auto* test. See, *e.g.*, *Budget Rent-A-Car of Washington* v. *Multnomah County*, 597 P.2d 1232, 1239 n.6 (1979).

Under the first prong, the interstate business must satisfy a threshold test of some minimum contact—a substantial nexus—with the state. *Nat'l Bellas Hess, Inc.* v. *Illinois Revenue Dep't*, 386 U.S. 753 (1967). If that threshold test is satisfied, the fourth prong requires only that the tax be related in some fashion to the extent of the contact, for it is the activities or presence in the state that may properly be made to bear a "just share of state tax burden."

For example, in *Nat'l Geographic Society* v. *California Board of Equalization, supra*, the Court sustained against challenges under the Due Process and Commerce Clauses the imposition of use-tax-collection liability on the Society for its mail order business within the state. The presence of two officers within the state and the solicitation there of $1 million annually for advertising furnished a sufficient nexus to render constitutional the Society's tax liability, as measured by the volume of mail order sales in California. See also *Standard Pressed Steel Co.* v. *Washington Revenue Dep't*, 419 U.S. 560 (1975).

The Montana Coal Severance Tax stands on far stronger ground. The "operating incidence" of the tax (*General Motors Corp.* v. *Washington, supra*, 377 U.S. at 440-441) is the severance of coal within Montana. The tax, measured as a percentage of the value of the coal taken, plainly is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. *Id.* at 441.[19] Compare *Nippert* v. *Richmond*, 327 U.S. 416, 427 (1946); *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 82 (1938). When the tax is levied in proportion to the taxpayer's activities or presence in the state, the taxpayer is shouldering his fair

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[19] As the Court stated in *Wisconsin* v. *J. C. Penney Co., supra*, "the *incidence* of the tax as well its *measure* [must be] tied to the earnings which the State * * * has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes." 311 U.S. at 446 (emphasis added).

burden of supporting that state's police and fire protection and other "advantages of a civilized society." *Exxon Corp.* v. *Wisconsin Dep't of Revenue, supra,* slip op. 19, quoting *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 445 (1979); see also *Washington Revenue Dep't* v. *Ass'n of Washington Stevedoring Cos., supra,* 435 U.S. at 764 (Powell, J., concurring).[20]

This is not to suggest that the "fairly related" test is an empty one. In many cases, particularly those involving a tax on an aspect of interstate transportation, that test will furnish a useful supplement to the inquiry whether the tax is fairly *apportioned* to that portion of interstate activities taking place in the state. For when the measure of a state tax is out of all proportion to the activities occurring within the state, the Court may properly conclude that the state is seizing upon the occasion of a relatively minor contact with the state to impose an undue burden on interstate commerce, not merely requiring a company engaged in interstate commerce to bear its "just share of state tax burden." See, *e.g.*, our Complaint in intervention (at 3) in *Maryland* v. *Louisiana,* No. 83 Orig. (argued Jan. 19, 1981).[21] But

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[20] Thus, the reference in the cases to police and fire protection and benefits of a civilized society is not, as appellants suggest (Br. 30), a disingenuous incantation designed to avoid a more searching analysis of whether the value of the benefits the taxpayer actually receives is in fact roughly equivalent to the amount of taxes he pays. If the tax is related to the taxpayer's activities or presence in the state (for which it receives some benefit, *e.g.*, the substantial privilege of mining coal), the taxpayer will realize, in proper proportion to the taxes it pays, "[t]he only benefit to which [it] is constitutionally entitled * * * [—] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." *Carmichael* v. *Southern Coal & Coke Co., supra,* 301 U.S. at 522.

[21] This, and the Framers' special concern with the question of tolls imposed by states in a position to obstruct the interstate movement of goods and persons (see *Developments, supra,* 75 Harv. L. Rev. at 969-970), may explain the Court's closer scrutiny of "user" fees and comparable charges imposed for the purpose of maintaining facilities used in interstate transportation. See *Evans-*

whatever the result in other contexts, we believe that the Montana Coal Severance Tax, measured by the value of coal taken, is in proper proportion to the activities of the appellant coal producers in the State and is, as a consequence, "fairly related to the services provided by the State" within the meaning of the fourth prong of the *Complete Auto* test.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted.

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ville Airport v. *Delta Airlines*, 405 U.S. 707 (1972), and other cases cited by appellants (Br. 32). Moreover, in such cases, the nexus of the goods or passengers to the taxing state is more transitory than that of appellants in the present case such that it might be unfair to burden them unduly with support of the "civilized society" in the state generally.

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